

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE THOMAS NOVAK,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 284838

Bay Circuit Court

LC No. 06-010653-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent from the majority's holding that the trial court properly admitted defendant's "sex manual" under MRE 801(d)(2)(A), MRE 401, and MRE 403. Notwithstanding that the manual did not constitute hearsay, its admission violated MRE 404, and this error cannot be deemed harmless. Furthermore, I disagree with the majority's conclusion that the prosecutor presented sufficient evidence that defendant sexually penetrated the victim. These improprieties require reversal of defendant's convictions.

I. Facts and Proceedings

The prosecutor charged defendant with sexually assaulting CB, his seven-year-old granddaughter. The information sets forth one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) ("penis in buttocks"), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Pursuant to a search warrant, a Bay City detective seized from defendant's residence a laptop case that contained a 14-page, typed document referred to in this case as a "sex manual." The detective described the document at trial as "a story about four subjects engaging in different forms of sex with each other." The "subjects" included a father, his son and daughter, and a cousin. Defendant told the detective that "he was writing a sex manual, with the title of 'Johnny's Education.'"

Before trial, the prosecutor filed a notice of intent to introduce the sex manual as evidence of other crimes, wrongs or acts under MRE 404(b).¹ The prosecutor's notice averred

¹ The prosecutor also notified the defense that she intended to introduce the testimony of other family members who claimed that defendant had sexually assaulted them.

that the “teaching manual” showed defendant’s “intent, motive, absence of mistake or accident, scheme, plan or system in doing an act,” and would serve to rebut defendant’s position that the victim had fabricated the charged sexual contact. Defendant objected that the evidence was irrelevant and “highly prejudicial,” and complained that the prosecutor had failed to identify a specific purpose supporting admissibility under MRE 404(b). The trial court ruled that the document was relevant “regarding intent, motive, absence of mistake, accident, etcetera,” and that “the danger of unfair prejudice is not substantially outweighed by the probative value of the evidence.”

The sex manual comprised the evidentiary centerpiece of defendant’s trial. Within the first transcribed page of the prosecutor’s opening statement, she asserted that defendant had sexually abused CB and that “other victims” would testify about defendant’s commission of other sexual assaults. On the second and final transcribed page of the opening statement, the prosecutor introduced the jury to the sex manual:

You’re also going to hear the words of the defendant in the form of a story, described by the defendant as a teaching manual. It is of a sexual nature. These are ... difficult words to hear. These words are words such as this,

“Sally started to swallowing every drop of daddy’s dessert and kept on giving him what she hoped was the greatest blow job of his life. Now her dream had come true and she wasn’t about to stop now. Sally kept stroking and stroking his dick, and her lips were running up and down his shaft, wishing this could last all day. As her lips and tongue were working on daddy’s big dick, her pussy started to tingle, and an orgasm overtook her. Wave after wave of pure ... ecstasy swept through her body, all the while she kept working his dick over. She would make him come one more time and then she would ride him hard. She had dreamed of his dick deep inside her since she was 12 and she was going to make it happen today.”

When you hear the testimony, you will be able to find the defendant guilty of the crimes he committed. You will be able to find the defendant guilty of violating the trust, the soul, and the body of someone who was someone he was suppose [sic] to love, and care for, and protect. You will be able to find the defendant guilty of violating [CB].

Defense counsel’s opening statement characterized the case as involving “a long-standing, bitter dispute that goes back 30 or 40 years to [CB’s] mother, Laura Laberge [sic].” The defense maintained that LaBerge was a chronic liar who had previously accused defendant of sexual assault only to later recant the accusation, and that LaBerge contrived CB’s testimony and encouraged LaBerge’s former stepdaughters to also concoct sexual abuse allegations against defendant.

Three witnesses described at trial prior sexual improprieties committed by defendant. JL, a former stepdaughter of LaBerge who was 18 years of age at the time of trial, reported that defendant “would do things and say things that were sexually explicit and inappropriate,” touched her “butt” on more than one occasion, and “showed [her] a story that he wrote on his on his laptop computer, and it was basically about little kids that were cousins that were like

performing sexual acts on one another.” Another of LaBerge’s former stepdaughters recounted that on one occasion defendant had touched her breasts under her clothes and also touched her vagina through her clothes while touching himself. LaBerge recalled that when she was 10 or 11 years of age, defendant repeatedly placed his penis in her mouth and penetrated her vagina with his fingers, mouth and penis. In light of LaBerge’s sexual abuse allegations, a Child Protective Services worker removed LaBerge from her home. LaBerge admitted that she subsequently recanted the allegations, but claimed she did so only because she wanted to return home to her mother, despite defendant’s continued presence there.

CB, who was nine-years-old at the time of trial, described the “places people aren’t suppose[d] touch you” as “boobs, front butt, and back butt.” CB testified that while she sat on defendant’s lap watching a movie, he touched her breasts through her clothing, and that through defendant’s pants he caused his “front butt” to touch “[t]he inside” of her “back butt.”

Defendant presented testimony by LaBerge’s biological father, Robert Cassada, who had divorced Mary Novak, LaBerge’s mother, and later consented to defendant’s adoption of LaBerge and the other children he fathered with Novak. Cassada felt that defendant was a “good parent,” and opined that if LaBerge “couldn’t get attention, she would make up anything to become that center of attention.” The prosecutor used defendant’s authorship of the sex manual to challenge Cassada’s testimony that defendant was a good parent, inquiring whether “somebody who would write that” was “somebody you think is okay to be around kids?” Defendant did not testify.

In the prosecutor’s closing argument, she reminded the jury that it had “heard the words of the defendant” in the form of the sex manual, and that “[t]his ‘Teaching Manual,’ this story, is a window into the defendant’s mind.” The prosecutor then read aloud a second, two-paragraph sexually graphic portion of the sex manual, prefacing the passage with the statement, “These are some of what came out of the defendant’s mind.” After reading the excerpt, the prosecutor reiterated, “This is a window into the defendant’s mind.”

II. Admission of the Sex Manual

The majority reasons that because the sex manual “did not describe any other crime or prior act at all,” its admission was not governed by “the general rule of exclusion” of character or propensity evidence codified in MRE 404(b)(1). *Ante* at 3. The majority theorizes that the trial court properly admitted the sex manual “as a party admission under MRE 801(d)(2)(A),” which was “relevant evidence of defendant’s state of mind and motive, MRE 401.” *Id.* However, the majority’s analysis is fundamentally flawed for three reasons. First, the majority’s hearsay analysis under MRE 801(d)(2)(A) is entirely irrelevant and unnecessary. Because the prosecutor did not offer the sex manual to prove the truth of the matters asserted within it and the defense never raised a hearsay objection, the document simply does not embody hearsay as defined in MRE 801.

Second, even if defendant had raised a hearsay objection, the manual does not automatically become admissible merely because it amounts to nonhearsay. Evidence that avoids exclusion under the hearsay rule remains subject to exclusion pursuant to the other rules of evidence. If a court determines that proffered evidence does not constitute hearsay, “all inquiry does not end. The next question which must be asked and satisfactorily answered, is

what will the proffered testimony tend to establish, and assuming that the testimony will establish something, will that ‘something’ serve to shed light upon a material issue in dispute?” *People v Wilkins*, 408 Mich 69, 72-73; 288 NW2d 583 (1980); see also MRE 402 (“All relevant evidence is admissible, except as otherwise provided by ... these rules ...”).

The final flaw in the majority’s reasoning occurs in its discussion of MRE 404. The majority finds that the admission of the sex manual did not implicate MRE 404(b): “The ‘sex manual’ did not describe any other crime or prior act at all, and therefore did not fall within the general rule of exclusion contained in the first sentence of MRE 404(b)(1).” *Ante* at 3. In my estimation, defendant’s authorship of the sex manual constitutes an “act” that falls within the scope of MRE 404(b). Even if the majority correctly finds that MRE 404(b) does not apply, the manual nonetheless constituted inadmissible character evidence under MRE 404(a). The *substance* of the sex manual had no relevance to whether defendant sexually abused CB. As the majority concedes, the prosecutor introduced the sex manual to prove defendant’s “state of mind and motive.” *Ante* at 3. But the “state of mind and motive” label merely disguises character evidence actually employed for a clearly improper propensity purpose.

A. Character Evidence Generally

In *Michelson v United States*, 335 US 469, 475; 69 S Ct 213; 93 L Ed 168 (1948), the United States Supreme Court observed, “Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt.” Our Supreme Court has also recognized that a criminal defendant’s foul character cannot establish his guilt of a charged crime. For example, in *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990), the Supreme Court declared that “[o]nly one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely . . . to have committed the act in question.” (Quoting 2 Weinstein, Evidence, ¶ 404(8), p 404-52). And in *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Supreme Court reemphasized the rule prohibiting a conviction premised on a defendant’s general tendency to engage in misconduct: “If the proponent’s only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.” The rationale for excluding character evidence rests on its potential to overwhelm evidence directly relevant to the charged offense:

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. [*Michelson*, 335 US at 475-476.]

Pursuant to MRE 404(a), “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,” with certain exceptions inapplicable here. Assuming that defendant’s creation of the sex manual did not represent an “act” subject to MRE 404(b), the prosecutor made plain at trial that she

introduced the document as “a window into the defendant’s mind,” a window that revealed defendant to be a sexual deviant who fantasizes about incest. Stated differently, the prosecutor specifically and improperly emphasized that defendant possessed a morally repugnant character and a lustful disposition. In Michigan, a prosecutor may not rely on evidence of a “lustful disposition” to prove a defendant’s propensity to commit a sex crime. *People v Sabin (After Remand)*, 463 Mich 43, 60-61; 614 NW2d 888 (2000).

In summary, according to the majority’s analysis, the sole fact the sex manual tended to prove was defendant’s proclivity and desire to engage in incestuous relationships. If the majority has accurately characterized the evidentiary purpose as demonstrating defendant’s state of mind, the trial court should have excluded this character evidence. See *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004) (cautioning that “[w]here the only relevance of the proposed evidence is to show the defendant’s character or the defendant’s propensity to commit the crime, the evidence must be excluded.”).

B. Analysis under MRE 404(b)

In *Sabin*, 463 Mich at 56, our Supreme Court explained that the initial sentence in MRE 404(b) embodies the “general rule ... prohibiting the *use* of evidence of specific acts to prove a person’s character to show that the person acted in conformity with character on a particular occasion.” (Emphasis in original). “Rule 404(b) [does] permit[] the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory.” *VanderVliet*, 444 Mich at 65 (emphasis in original). In my view, the prosecutor and the trial court correctly identified MRE 404(b) as the proper rule governing the sex manual’s admissibility. However, the trial court erred by concluding that the sex manual had relevance to any issue or fact of consequence in this case.

In ruling on the admissibility of other acts evidence under MRE 404(b)(1), a trial court must ascertain whether (1) the prosecutor has offered the evidence for a proper purpose—one other than to show the defendant’s propensity to act in conformity with a given character trait; (2) the evidence has relevance to an issue of fact of consequence at trial, MRE 402; (3) any danger of unfair prejudice substantially outweighs its probative value, in light of the availability of other means of proof, MRE 403; and (4) a cautionary instruction is appropriate. *Sabin*, 463 Mich at 55-56. “That the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render the other acts evidence relevant in a particular case.” *Id.* at 60. The trial court still must find that the evidence qualifies as material (i.e., related to a fact “at issue” “in the sense that it is within the range of litigated matters in controversy”), and that it has probative force (i.e., “any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence”). *Id.* at 56-57, 60 (internal quotation omitted).

The trial court opined that the sex manual was admissible to show “intent, motive, absence of mistake, accident, etc.” This rote recital of the paths to admissibility identified in MRE 404(b) does not suffice to properly identify the specific purpose for which the evidence was relevant. “Mechanical recitation of ‘knowledge, intent, absence of mistake, etc.’ without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else.” *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785

(1998). Here, none of the purposes mentioned in MRE 404(b)'s "laundry list" supports admission of the sex manual.

The majority submits that the sex manual "was certainly probative of defendant's interest in sex with minors," and "was certainly relevant evidence of defendant's state of mind and motive." *Ante* at 3. The majority apparently concludes that defendant's motive in assaulting CB was to have sexual contact with a young family member. But as the Supreme Court held in *Sabin*, 463 Mich at 68, "[t]his proffered purpose is undistinguishable from the so-called 'lustful disposition' rule," which our Supreme Court never adopted. The majority's theory of logical relevance "would allow use of the evidence for the prohibited purpose of proving defendant's character to show that he acted in conformity therewith during the events underlying the charged offense." *Id.* Nor would the manual warrant admission to prove defendant's intent. One of the charged acts, CSC I, is a general intent crime, which requires no proof of specific intent. *Id.* at 68-69. Although defendant also stood trial for CSC II, the defense never posited that defendant lacked the intent to touch CB's breast; the defense never wavered from its position that the charged contact simply did not occur. Consequently, evidence regarding defendant's intent had no relevance at his trial.

Similarly, admission of the sex manual did not serve to demonstrate the absence of mistake. Defendant did not challenge CB's perception of the events as she described them; rather, the defense contended that LaBerge scripted CB's testimony and that defendant never engaged in any sexual misconduct with the child. Because defendant never suggested that CB had misconstrued what occurred, the manual was not relevant to prove an absence of mistake.

Where, as here, a defendant's theory of the case is that the charged incidents never occurred, "evidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin*, 463 Mich at 62. Evidence of sufficiently similar prior acts can be used "to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Id.* at 63-64 (internal quotation omitted). "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. There must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id.* at 64-65 (internal quotation and emphasis omitted). A high degree of similarity must exist—more "than that needed to prove intent, but less than that needed to prove identity"—but the plan itself need not be unusual or distinctive. *Id.* at 65-66.

As was true in *Engelman*, 434 Mich at 221, "[t]his is not a case in which the evidence of the uncharged act shows that the defendant in fact and in mind formed a plan" (Internal quotation omitted). The criminal acts alleged here against CB lacked any relationship to defendant's act of authoring a sexual "teaching manual," or to the substance of the material contained in that document. Furthermore, virtually no similarities exist between the sexual acts described in the manual and the acts of criminal sexual conduct that defendant allegedly inflicted on CB. The children described in the sex manual were at least 16-years-old, and most of the story detailed sexual relationships among the children, rather than between the father and his children. Moreover, no evidence exists that when defendant assaulted CB he adhered to any scheme or plan, rendering this aspect of MRE 404(b) completely inapplicable.

Even were some thread of relevance available to link the sex manual with the charged conduct, the trial court should have excluded the manual under MRE 403. The sex manual is a clumsily written, sexually explicit, generally repulsive document that utterly lacks literary or artistic merit. Indisputably, a high likelihood existed that the manual would transgress most jurors' norms of decency and morality. The danger of unfair prejudice attending this document far outweighed whatever marginal probative value it may have possessed. And throughout defendant's trial, the "reverberating clang" of the sex manual entirely "drowned the 'weaker sound' of the other evidence properly before the jury," leaving the jury with the indelible impression that defendant was morally bankrupt and sexually degenerate, and thus guilty of assaulting CB. *Crawford*, 458 Mich at 399, quoting *Shepard v United States*, 290 US 96, 104; 54 S Ct 22; 78 L Ed 196 (1933). I would conclude that the trial court abused its discretion by failing to exclude the sex manual on the basis that the manual's extremely prejudicial nature completely overwhelmed any minimal probity the document potentially offered.

C. Harmless Error Analysis

Preserved nonconstitutional error "is harmless unless the defendant demonstrates that the error was outcome determinative." *People v Schaefer*, 473 Mich 418, 443; 703 NW2d 774 (2005), mod in part on other grounds in *People v Derror*, 475 Mich 316, 320, 334, 341-342; 715 NW2d 822 (2006). The defendant must demonstrate "that it is more probable than not that the error was outcome determinative." *Id.* (internal quotation omitted). "An error is not outcome determinative unless it undermined the reliability of the verdict." *Id.* (internal quotation omitted).

In my judgment, the improper admission of the sex manual determined the outcome of this case. Absent this evidence, the primary witness against defendant was nine-year-old CB, whose abbreviated testimony substantially lacked clarity. The prosecutor recognized the inherent potential weakness of CB's account of events and undoubtedly knew that LaBerge's testimony would reveal that she had a motive to coach CB.² For these reasons, the prosecutor brought up the sex manual at every possible opportunity, even when she cross-examined the sole defense witness. During her opening statement and closing argument, the prosecutor relied heavily on the words of the sex manual for a single and improper purpose: to prove that defendant had abused CB because he had written the manual.

The trial court's limiting instruction did not suffice to offset the unfairly prejudicial impact of the sex manual. Here, as in *Crawford*, 458 Mich at 399 n 15, "the *only* real relevance" of the improperly admitted evidence was to depict defendant as an incestuous deviant, and "[a]gainst this, the limiting instruction was not limiting at all." (Emphasis in original). Because the words of the improperly admitted sex manual permeated this trial and undermined the reliability of the jury's verdict, I would reverse defendant's convictions and remand for a new trial.

² The prosecutor also knew that CB had been sexually assaulted by her stepbrother, and that the trial court ruled that the defense could introduce police reports pertaining to the abuse.

III. Sufficiency of the Evidence of CSC I

When determining whether sufficient evidence supports a conviction, “a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This standard, articulated in *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), reflects “an attempt to give ‘concrete substance’” to a criminal defendant’s due process rights. *Id.* at 514. The beyond a reasonable doubt standard requires that the fact finder “reach a subjective state of near certitude of the guilt of the accused” *Jackson*, 443 US at 315.

The prosecutor charged defendant with CSC I, specifically sexual penetration of a person under 13 years of age. MCL 750.520b(1)(a). In MCL 750.520a(r),³ the Legislature defined “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” The information alleges that defendant committed CSC I through “penis in buttocks” penetration. The information’s description does not satisfy the legislative definition of penetration in MCL 750.520a(r).

Furthermore, the evidence presented at defendant’s trial proved nothing more than that, through defendant’s pants, his erection penetrated CB’s buttocks. No evidence of record reasonably supports that defendant penetrated CB’s anal opening, even slightly. CB testified about the incident as follows:

Prosecutor: Let me ask you this. On your back butt, is there an inside and outside of your back butt?

CB: Yes.

Prosecutor: What part did it touch?

CB: The inside.

Prosecutor: What did his front butt—what did it feel like?

CB: I don’t remember.

Prosecutor: Don’t remember. Do you remember what you were wearing?

CB: Mmm-mm. No.

Prosecutor: Did you say it touched the inside of your back butt?

³ Formerly MCL 750.520a(o).

CB: Mm-hmm.

Prosecutor: Okay. And what other parts of you did he touch?

CB: My boobs.

Prosecutor: Okay. And what did he touch 'em with?

CB: His hands.

Prosecutor: Okay. Was it over your . . . you don't remember what you were wearing, right?

CB: No.

Prosecutor: Was it over or under whatever you were wearing?

CB: Over.

Prosecutor: Okay. Did it happen one time or more than one time?

CB: One time.

Prosecutor: 'Kay. Did his hands touch ya any other place?

CB: No.

CB additionally confirmed at trial that defendant wore pants when his "front butt" touched her "back butt."

The majority reasons that "[w]hile the victim did not use the generally accepted terminology, it reasonably follows from her explanation of the various anatomical parts that she was describing her anus and defendant's penis." *Ante* at 6. This reasoning ignores that CB never offered or provided a meaningful explanation of the "anatomical part[]" defendant allegedly penetrated. She agreed that her "back butt" has an "inside and outside," but her testimony nowhere tends to establish that defendant penetrated her anus, as opposed to the inside of her buttocks. Given this record, the jury's inference that defendant penetrated CB's anus rests on evidence "which is uncertain or speculative or which raises merely a conjecture or possibility." *People v Hardiman*, 466 Mich 417, 427; 646 NW2d 158 (2002) (internal quotation omitted).

In *Jackson*, 443 US at 319, the United States Supreme Court emphasized the responsibility of the fact finder "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." (Emphasis added). Even when viewing the evidence in the light most favorable to the prosecutor, a reviewing court should not uphold a verdict predicated on unreasonable evidentiary interpretations or pure speculation concerning the basic facts. Indeed, *Jackson* mandates that the evidence implicate a defendant to "a state of near certitude." *Id.* at 315. CB's testimony entirely failed to distinguish between the inside of her buttocks and her anus, and established that defendant and CB wore clothing when the anal penetration allegedly occurred. In light of CB's vague and unclear

description of what she meant by “the inside” of her “back butt,” the jury’s conclusion that defendant penetrated CB’s anus rests on anatomical conjecture and an unreasonable inference. Because insufficient evidence supports that defendant penetrated CB’s anus, his CSC I conviction must be reversed.

IV. Defendant’s Sentence

The sentences the trial court imposed for defendant’s CSC I conviction exceeded the sentencing guidelines. For the CSC I conviction, the guidelines called for a minimum sentence between 81 and 168 months. The trial court sentenced defendant to 240 to 480 months’ imprisonment for the CSC I count and 120 to 270 months’ for the CSC II conviction.⁴ The court explained that defendant’s past sexual abuse of LaBerge constituted a substantial and compelling basis for departing from the guidelines, and continued,

In addition, we have the manual, and I’m not gonna read the manual, but I’m gonna make sure that it’s part fo [sic] the record that goes along with the Presentence Report because it was . . . an exhibit on 3-1-07. I believe that was a hearing that we had on its admissibility and it was also an exhibit at the trial. And I want that to be attached to the Presentence Report because I think it’s another basis for departing or a deviation.

And I’m not gonna go through all of that, but it’s—I think explains a lot of the circumstances that we’re having here including one of the 404(b) witness’s indication that he had her perceive that manual on the laptop and keep it from the others when she was doing that, and he was utilizing that and enticing her and trying to provoke her to be sexually active, and from the testimony, it appeared from with him at the time.

A defendant’s “appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). “The ‘principle of proportionality ... defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.’” *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008), quoting *Babcock*, 469 Mich at 262. In *Smith*, our Supreme Court emphasized that “the very purpose of the sentencing guidelines is to facilitate proportionate sentences.” *Id.* at 305. And when a trial court departs from the sentence calculated under the sentencing guidelines, “the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* at 304.

Here, the trial court failed to offer any explanation for its decision to impose the particular departures it selected. “[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for

⁴ The court did not score guidelines applicable to the CSC II conviction.

departure and the extent of the departure is unclear.” *Smith*, 482 Mich at 304. Because the trial court offered no explanation how the *extent* of the departure was proportionate to the nature of defendant’s offenses and his background, defendant must be resentenced.

The trial court’s decision to depart on the basis of defendant’s abuse of LaBerge does not qualify as a substantial and compelling reason because the alleged abuse of LaBerge 25 years earlier was neither objective nor verifiable. “Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed.” *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). The record contains no objective confirmation of LaBerge’s previously recanted, now reiterated contentions that defendant ever abused her. Therefore, the trial court erred by relying on this alleged abuse as a ground for a sentence departure.

Furthermore, the trial court erred by relying on the sex manual as a basis for a departure. Although defendant’s creation of the sex manual amounts to an objective and verifiable fact, the manual’s mere existence is not an objective and verifiable reason for the sentence departure. Defendant violated no law when he authored the sex manual. Writing about one’s sexual fantasies or crafting a sexually explicit story does not constitute misconduct. The trial court departed on the basis of its subjective reaction to the sex manual’s content and its subjective beliefs about defendant’s character arising from his authorship of the manual. The trial court’s determination that because defendant wrote a story involving incest he deserves enhanced punishment, or is likely to act in conformity with his fiction, qualifies as subjective and nonverifiable.⁵ For these reasons, the trial court should resentence defendant.

/s/ Elizabeth L. Gleicher

⁵ From Oedipus to Lolita, incest has served as the subject of countless books and stories. No evidence tends to show that the authors of these fictional accounts are likely to engage in incest. Nor do writers of violent crime fiction generally display violent criminal propensities.